



PRIOR PROCEEDINGS

In 1979, Petitioner was convicted of rape in concert with the use of a firearm, forcible oral copulation, robbery, and kidnapping for the purpose of robbery (the "Conviction"), and he received a sentence that included an indeterminate term (the "Sentence"). (Petition at 1.)<sup>1</sup> On May 16, 2002, Petitioner filed a Section 2254 petition in this Court, captioned Roy Lee Doss v. D.K. Butler, Case No. CV 02-3967-MMM (MAN) (the "First Petition"). The First Petition challenged Petitioner's Conviction and Sentence based on claims of prosecutorial misconduct, ineffective assistance of trial and appellate counsel, and sentencing errors. With respect to the asserted sentencing errors, Petitioner complained, *inter alia*, that: with respect to the kidnapping conviction, the permissible maximum sentence was life with the possibility of parole, and the trial court erred by sentencing Petitioner to a term of "natural life" for that crime; the trial court erred, under California Penal Code § 654, with respect to the multiple sentences imposed; and the trial court had failed to issue a corrected abstract of judgment that clarified the sentences imposed. (First Petition at 6; attachment at 1-3; and attached California Supreme Court habeas petition at 3 and attachment at 2.) On December 2, 2002, Judgment was entered dismissing the First Petition action, with prejudice, on the ground that it was untimely by over five years.

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<sup>1</sup> As discussed *infra*, Petitioner has filed numerous habeas actions in this Court. Pursuant to Rule 201 of the Federal Rules of Evidence, the Court has taken judicial notice of its records and files in each of Petitioner's actions, some of which include more detailed information and records than have been provided by Petitioner in the instant action, as well as the electronic dockets for Petitioner's proceedings in the United States Court of Appeals for the Ninth Circuit, which are available through the PACER system.

1 Petitioner's appeal was unsuccessful, as the Ninth Circuit denied his  
2 request for a certificate of appealability on April 21, 2003, and the  
3 mandate issued on May 6, 2003.

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5 Five years later, Petitioner filed a second Section 2254 habeas  
6 petition in the United States District Court for the Eastern District of  
7 California, which was transferred to this district and filed on July 28,  
8 2008. That petition was captioned Roy Lee Doss v. James D. Hartley, CV  
9 08-4916-MMM (MAN) (the "Second Petition"). The Second Petition also  
10 attacked the validity of Petitioner's Sentence. On September 15, 2008,  
11 the Second Petition action was dismissed without prejudice on the ground  
12 that the Second Petition was second or successive, within the meaning of  
13 28 U.S.C. § 2244(b), and Petitioner had not obtained leave from the  
14 Ninth Circuit to file it. Petitioner did not appeal.

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16 On November 5, 2008, Petitioner filed a third Section 2254 habeas  
17 petition in this district, which was captioned Roy Lee Doss v. James D.  
18 Hartley, CV 08-7337-MMM (MAN) (the "Third Petition"). The Third  
19 Petition also attacked the validity of Petitioner's Sentence. On  
20 January 13, 2009, the Third Petition action was dismissed without  
21 prejudice on the ground that the Third Petition was second or  
22 successive, within the meaning of 28 U.S.C. § 2244(b), and Petitioner  
23 had not obtained leave from the Ninth Circuit to file it. Petitioner  
24 did not appeal.

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26 While the Third Petition action was pending, Petitioner filed a  
27 fourth Section 2254 habeas petition in this district, which was  
28 captioned Roy Lee Doss v. James D. Hartley, CV 08-8240-MMM (MAN) (the

1 "Fourth Petition"). The Fourth Petition again attacked the validity of  
2 Petitioner's Sentence. Grounds Two and Three of the Fourth Petition  
3 raised claims that were alleged in the First, Second, and Third  
4 Petitions and previously dismissed for untimeliness and/or as second or  
5 successive. Ground One of the Fourth Petition challenged the May 9,  
6 2007 decision of the Board of Parole Hearings ("Board"), which found  
7 Petitioner unsuitable for parole, and alleged that Petitioner was  
8 deprived of due process because the Board "relied entirely" on the  
9 circumstances of the underlying offense and failed to conduct a  
10 balancing analysis. (Fourth Petition at 5 and attached page.) On  
11 January 13, 2009, District Judge Morrow dismissed Grounds One and Two of  
12 the Fourth Petition without prejudice, because they were second or  
13 successive and Petitioner had failed to obtain leave to bring them from  
14 the Ninth Circuit. By Order and Judgment entered on April 6, 2011,  
15 District Judge Morrow denied Ground Three of the Fourth Petition with  
16 prejudice, and the case was dismissed. Petitioner did not appeal.

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18 On August 10, 2011, Petitioner filed a fifth Section 2254 habeas  
19 petition in this district, which was captioned Roy Lee Doss v. James D.  
20 Hartley, CV 11-6574-MMM (MAN) (the "Fifth Petition"). The Fifth  
21 Petition, through Ground Four, attacks the validity of Petitioner's  
22 Conviction and Sentence, and through Grounds One through Three, asserts  
23 various parole-related claims. The United States Magistrate Judge has  
24 recommended that the Fifth Petition be denied and dismissed, including  
25 on the ground, *inter alia*, that certain of the claims alleged are second  
26 or successive.

**THE PRESENT PETITION**

The instant Petition presents five habeas claims. Ground One alleges that the trial court erred in sentencing Petitioner to a term of "natural life" and, further, committed error under California Penal Code § 654. (Petition at 5.) Ground Two alleges that Petitioner's trial counsel provided ineffective assistance by failing to contest the above asserted sentencing errors. (*Id.*) Ground Three alleges that the trial judge committed judicial misconduct through the above asserted sentencing errors. (*Id.* at 5-6.) Ground Four alleges that the prosecutor committed misconduct by allowing these same asserted sentencing errors to "go uncontested." (*Id.* at 6.) Ground Five alleges that Petitioner's appellate counsel provided ineffective assistance by failing to raise the above four claims, as well as by failing to forward the trial transcripts to Petitioner, which deprived him of his chance to "Appeal earlier." (*Id.*)

**DISCUSSION**

State habeas petitioners generally may file only one federal habeas petition challenging a particular state conviction and/or sentence. *See, e.g.,* 28 U.S.C. § 2244(b)(1) (courts must dismiss a claim presented in a second or successive petition when that claim was presented in a prior petition) and § 2244(b)(2) (with several exceptions not applicable here, courts must dismiss a claim presented in a second or successive petition when that claim was not presented in a prior petition). "A habeas petition is second or successive . . . if it raises claims that were or could have been adjudicated on the merits" in an earlier Section

1 2254 petition. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009).

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3 In those instances in which Section 2244(b) provides a basis for  
4 pursuing a second or successive Section 2254 habeas petition, state  
5 habeas petitioners seeking relief in this district court must first  
6 obtain authorization from the Ninth Circuit before filing any such  
7 second or successive petition. 28 U.S.C. § 2244(b)(3). The Ninth  
8 Circuit "may authorize the filing of the second or successive [petition]  
9 only if it presents a claim not previously raised that satisfies one of  
10 the two grounds articulated in § 2242(b)(2)." Burton v. Stewart, 549  
11 U.S. 147, 153, 127 S. Ct. 793, 796 (2007).

12  
13 In the First Petition action, Petitioner sought Section 2254 relief  
14 based on the same state court Conviction and Sentence challenged in this  
15 action. Moreover, the claims alleged in the instant Petition were  
16 raised in the First Petition action found to be untimely, as well as in  
17 his subsequent Section 2254 actions described above and dismissed as  
18 second or successive. The untimeliness of the First Action petition  
19 "presents a 'permanent and incurable' bar to federal review," and thus,  
20 the dismissal of the First Action "constitutes a disposition on the  
21 merits" for purposes of Section 2244(b). McNabb, 576 F.3d at 1029-30  
22 (citation omitted). The claims raised in the present Petition attacking  
23 Petitioner's Conviction and Sentence, therefore, are second or  
24 successive within the meaning of Section 2244(b). See *id.* (holding  
25 "that dismissal of a section 2254 habeas petition for failure to comply  
26 with the statute of limitations renders subsequent petitions second or  
27 successive for purposes of" Section 2244(b)); in accord Murray v.  
28 Greiner, 394 F.3d 78, 79 (2d Cir. 2005); Altman v. Benik, 337 F.3d 764,

1 766 (7th Cir. 2003).

2  
3 Critically, Petitioner has not obtained permission from the Ninth  
4 Circuit to bring these second or successive claims, as required by  
5 Section 2244(b)(3).<sup>2</sup> Permission to file a second or successive petition  
6 may be granted only if Petitioner makes a *prima facie* showing that: (1)  
7 the claim relies on a new, and previously unavailable, rule of  
8 constitutional law, which the Supreme Court has ordered be made  
9 retroactive to collateral proceedings; or (2) the factual predicate of  
10 the claim could not have been discovered earlier through the exercise of  
11 due diligence, and the facts alleged, if proven, would be sufficient to  
12 establish by clear and convincing evidence that, but for the  
13 constitutional error claimed, no reasonable fact-finder would have found  
14 Petitioner guilty. See 28 U.S.C. § 2244(b)(2)(A)(B) and (3)(C); McNabb,  
15 576 F.3d at 1030. To pursue a Section 2254 habeas action attacking his  
16 1979 Conviction and/or sentence, Petitioner must persuade the Ninth  
17 Circuit that at least one of these predicates exists for any claim he  
18 now wishes to raise. It is difficult to see how Petitioner will be able  
19 to satisfy Section 2244(b)'s requirements.<sup>3</sup>  
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21 As Petitioner has not obtained permission from the Ninth Circuit to  
22 bring a second or successive petition, the instant Petition must be  
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24 <sup>2</sup> The Court's PACER review shows that Petitioner has brought  
25 only two proceedings in the Ninth Circuit: (1) his unsuccessful appeal  
26 of the Judgment dismissing the First Petition action with prejudice,  
based on untimeliness; and (2) an application for leave to file a second  
or successive petition filed on October 14, 2008 (No. 08-74308), which  
the Ninth Circuit denied on December 3, 2008.

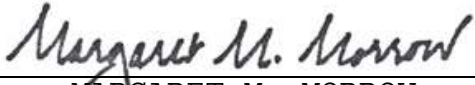
27 <sup>3</sup> Given the untimeliness of the First Petition action, it  
28 appears likely, if not certain, that the instant Petition also would be  
found untimely if the Court had jurisdiction to consider it.

1 dismissed, because this Court lacks jurisdiction to consider it. 28  
2 U.S.C. § 2244(b); see also Burton, 549 U.S. at 157, 127 S. Ct. at 799  
3 (district court lacks jurisdiction to consider the merits of a second or  
4 successive petition absent prior authorization from the circuit court).  
5 Accordingly, IT IS ORDERED that Judgment be entered dismissing this  
6 action without prejudice.

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8 In addition, pursuant to Rule 11(a) of the Rules Governing Section  
9 2254 Cases in the United States District Courts, the Court has  
10 considered whether a certificate of appealability is warranted in this  
11 case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-  
12 85, 120 S. Ct. 1595, 1604 (2000). The Court concludes that a  
13 certificate of appealability is unwarranted, and thus, a certificate of  
14 appealability is DENIED.

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16 IT IS SO ORDERED.

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18 DATED: April 23, 2013.

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21 MARGARET M. MORROW  
UNITED STATES DISTRICT JUDGE

22 PRESENTED BY:

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24 MARGARET A. NAGLE  
25 UNITED STATES MAGISTRATE JUDGE  
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